

BEFORE THE INVESTIGATIVE PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 09-524

WRITTEN RESPONSE IN LIEU OF PERSONAL APPEARANCE

Respondent of this inquiry hereby files this written response to the allegations being investigated by the Commission and would state the following:

1. The allegations in paragraph one are true. On August 28, 2009 at 9:00 a.m. a calendar call hearing was scheduled for Leon Butler in the case of *State v. Leon Butler*, along with approximately 150 other cases. At the end of the docket at 12:00 noon I asked the remaining people in the courtroom if anyone else had a matter on the docket. Mr. Leon Butler approached the podium and stated that he had a case on the docket. He informed me that he hired attorney Stephen Melnick. Mr. Melnick had not appeared at the scheduled status hearing, nor had he filed a written appearance as attorney of record on Mr. Butler's behalf. I reset the case to 1:30 p.m. in order to allow Mr. Butler to contact Mr. Melnick regarding representation.

Mr. Melnick did appear with Mr. Butler that afternoon at 1:30 p.m. Mr. Melnick handed me a notice of appearance and a motion to recuse which he said Mr. Butler executed during the lunch hour. I then placed Mr. Butler under oath and did conduct an evidentiary hearing for the purpose of determining whether he had executed the affidavit with knowledge, as I was seriously in doubt of his lawyer's ethics and whether Mr. Melnick had properly explained the motion to recuse and affidavit to the defendant.

Approximately two weeks after I had granted Mr. Melnick's previous three motions to recuse with regard to the Gibbs case and two other cases, Judge Kenneth Gillespie transferred the Gibbs case back to my division. I did not request the case to be transferred back. The reason stated for the transfer was that Mr. Melnick was not the attorney on the case and therefore no conflict existed. Once I learned this I asked the in-court clerk to order the other two files that I recused myself on to determine if Mr. Melnick was the attorney of either of those cases. I learned that he had not been the attorney of record in those cases either when he had asked that I recuse myself.

I have known Mr. Melnick as an attorney in Broward County for over twenty years prior to these incidents, and although we were friendly, I knew he had a reputation for being "less than ethical" at times, in the handling of his cases. As a judge I am known in the courthouse for occasionally ordering tough sentences where warranted, and therefore some lawyers would prefer I not preside over their client's cases.

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After realizing that Mr. Melnick had me recuse myself on cases which he had not even filed a notice of appearance, knowing that the allegations in his recusal motion were false, and knowing his general reputation in the legal community, I had concerns about whether he was apprising his supposed clients about any potential conflict he may have with me or whether he simply told them to sign the affidavit. I was additionally concerned that he may have also been forum shopping, that is, seeking to have me disqualified from cases he handled that involved offenses where his client would be exposed to a lengthy jail sentence.

I began the hearing procedurally by explaining to Mr. Butler that his attorney filed a motion to have me removed from the case fearing that I cannot be fair. I then asked Mr. Butler if he had any reason to believe that I could not be fair in his case, he seemed confused and answered, "I don't know." I then asked, "Is there any reason why you think that I cannot be fair in your case?" He shook his head 'no' but there was no verbal response from him. I then stated my question in another way in order to avoid any potential confusion, and I asked him, "Have you had any conversations with anyone that would lead you to believe that I cannot be fair?" Once again, he indicated that he had no idea what I was talking about. I then asked him if he had a conversation with his lawyer about anything that would lead him to believe that I could not be fair. Again Mr. Butler said he did not know.

At this point Mr. Melnick objected on the grounds of attorney-client privilege. I overruled the objection and informed Mr. Melnick that I would not get into the facts of the case (which would violate the privilege), and that I merely was questioning Mr. Butler regarding the contents of the motion. Mr. Melnick was clearly getting upset as his client was unable to answer any of my questions and did not seem to know anything about the recusal motion or the affidavit that he signed. It was obvious at this point that Mr. Melnick had his client sign an affidavit under oath, without explaining to him the contents of the affidavit.

Mr. Melnick was given the opportunity to question his client and clear up any ambiguity and he then asked his client: "Do you remember when I explained to you that the judge's wife was involved in an election....?" Mr. Butler then responded, "Yeah, what he just said." I asked Mr. Butler if he could give me one specific thing that was told to him and he could not. This affidavit was executed less than one hour before the hearing. It was clear that Mr. Melnick had filed a fraudulent affidavit with the court.

At the conclusion of the hearing, I told Mr. Melnick that this whole thing "smells bad." I told him that he could be exposing himself to disciplinary action by the Florida Bar for filing a fraudulent affidavit and that I suspected he was forum shopping. I then granted the motion to recuse. My actions in holding this hearing was pursuant to my belief that Mr. Melnick was perpetuating a fraud on the court and was consistent with the materials I was provided and taught at judicial college, that judges can conduct an evidentiary hearing on a motion to recuse, but by doing so cannot contest the facts and the motion must be granted. This is exactly what I did. Additionally, it must be noted that this hearing was held on August 28, 2009 which was prior to notification by this commission that my actions in *State v. Gibbs* were being investigated and that I had violated Rule 2.333 (f) of the Code.

2. The allegations in paragraph two are true in part and false in part. As I indicated in my response to paragraph one, I did place Mr. Butler under oath and did question him regarding his sworn affidavit. I strongly believed that based on Mr. Melnick's reputation as a lawyer, the fact that his motion to recuse was factually inaccurate, and the fact that he filed motions to recuse on cases he had not filed appearances on, that Mr. Butler did not know any of the facts that he supposedly swore to and I was correct. Had Mr. Butler answered my initial question with any answer related to the details of the motion, I would have dropped the inquiry immediately and granted the motion at that point. I only continued asking questions as it became more and more obvious that Mr. Melnick was perpetrating a fraud on the court.

Contrary to paragraph two I did not "threaten" Mr. Melnick with a bar complaint, I notified him that his actions were questionable and warned him that that he may be subject to disciplinary action by the Florida Bar based on his actions of filing a fraudulent affidavit and in forum shopping. Further, I did not say that the attorney-client privilege did not exist in my courtroom. I had practiced law for twenty years and been a judge for over three years and understood the attorney-client privilege. I have never used the narcissistic phrase, "my courtroom," ever.

Additionally, paragraph two erroneously states, "... Mr. Melnick continuously objected, but you *ignored* his objections." (Emphasis supplied). To the contrary, I entertained each and every one of Mr. Melnick's objections and ruled on each and every one. Not one objection was ignored. I overruled Mr. Melnick's objections with regard to the attorney-client privilege pursuant to the law and stated later in this response. See, paragraph 5 below.

3. The allegations in paragraph three are true as to the fact that the transcript of the hearing was unobtainable, but are false as to the suggestion that I was involved with the loss. I ordered the transcript from the court reporter Ms. Carrie Givens after the day's proceedings. I was considering filing a bar complaint against Mr. Melnick for filing a fraudulent affidavit with the court and forum shopping. I wanted to review the transcript of the hearing and attach it to the complaint. I later learned that Mr. Melnick ordered the transcript of the hearing as well. I did not hear him order it at the hearing that day as I was busy conducting hearings, but the court reporter did at a later date tell me that Mr. Melnick also ordered the transcript.

Ms. Amber Owen is the permanent court reporter assigned to my division; she is employed by Boss Court Reporters. Ms. Owen is not always able to work on Thursday and Friday and Boss Court Reporters, her employer, sends substitute reporters to cover. The inconsistency became a problem and they began sending Ms. Givens on a more regular basis. Ms. Givens was covering most of the Thursday and Friday hearings around the time of these cases. Ms. Givens was sloppy with her work and had made multiple mistakes while she had been working in the courtroom in my division. I was very patient with her though, as I knew she needed the work since she was a single mother with two children.

A few days after I ordered the transcript Ms. Givens came to me very distressed. She explained that the paper jammed in her machine during the hearing. That she did not stop the hearing to fix the paper jam because she was running a tape recorder in the background and believed that the recorder would capture the hearing and she could transcribe it from the tape. This hearing was the first hearing of the afternoon at 1:30 p.m., no other hearing had been held before Mr. Butler's.

Ms. Givens further explained to me that when she tried to retrieve the hearing on tape she discovered that not only had her machine malfunctioned but the tape recorder did not tape the hearing either. She attributed this to her having listened with her headphones to the tape recorder during the lunch break in order to catch up with her transcripts. She had left the headphone plug in the machine and this rendered the recorder unable to tape the hearing even though the recorder was on. She discovered the problem after the Butler hearing and quickly fixed the problem before the next hearing started. I was very concerned about this situation as I was planning on filing a complaint with the Florida Bar regarding Mr. Melnick's filing of a fraudulent motion and the transcript contained the basis of the complaint.

Mr. Melnick was fortunate that the court reporter was unable to provide a transcript because I decided not to file a bar complaint without a copy of the transcript. Ms. Givens informed me that she had been Mr. Melnick's personal court reporter for his depositions prior to her doing courtroom work. She had a personal relationship with Mr. Melnick and I wondered if there was any wrongdoing with regard to the court reporter's error to protect Mr. Melnick from a significant bar complaint.

At the time I held this hearing and when the transcript was ordered I was still under the belief that holding an evidentiary hearing was allowed, pursuant to the judicial college materials. As such I wanted the transcript only for the purpose of forwarding it to the Florida Bar with regard to Mr. Melnick's actions. Paragraph three seems to suggest that I was involved in some way with the loss of the transcript; however I have no reason to "make a transcript disappear."

Ms. Givens was not my assigned court reporter as stated in paragraph three and any suggestion that I may have influenced her to lose the transcript is ludicrous and slanderous. I was very disturbed when I learned of Ms. Givens errors and the fact that there was no transcript of the hearing. I was additionally skeptical and concerned regarding her relationship with Mr. Melnick. The record was there to protect all parties as well as the judge. The failure to produce a transcript was the final straw and I have since asked the court reporting agency to no longer send Ms. Givens to the courtroom.

4. The allegations in paragraph four are true. As I stated in section one above, Judge Gillespie transferred the case back to me indicating that Mr. Melnick was not the attorney of record, and therefore and potential conflict did not exist. I questioned Mr. Gibbs about his motion to disqualify for two reasons: First, because the case was reassigned to me, I wanted to make sure that he did not have any fears about me being impartial. If he did, I would have transferred the case back to Judge Gillespie. I inquired of both his attorney and Mr. Gibbs to see if there was any objection to the case staying in my division. If the Commission reviews the transcript of the sentencing, it will see that I did an exhaustive inquiry to make sure that Mr. Gibbs had no fears about me being the judge.

Secondly, after Mr. Gibbs indicated that he wanted me to remain his judge, I then asked him if he had any conversations with attorney Stephen Melnick regarding the contents of the motion to disqualify. I asked this question because I was aware that Mr. Leon Butler had no knowledge of the contents of the motion that he signed and that was presented to him by Mr. Melnick. I had intended on referring Mr. Melnick to the Florida Bar for filing a fraudulent affidavit but could not do so without a transcript. Had Mr. Gibbs also stated that Mr. Melnick did not inform him of the contents of the motion, then based on Mr. Gibbs's testimony (and transcript) and a recreation

of the record on Mr. Butler I could have referred Mr. Melnick to the Florida Bar for disciplinary proceedings. However, Mr. Gibb's did state that Mr. Melnick did inform him about the facts and I discontinued my questioning on that subject and declined at that time to refer Mr. Melnick to the Florida Bar.

5. The allegations in paragraph five are true. I did entertain Mr. Melnick's objections based on the attorney-client privilege and overruled those objections. I did so pursuant to the law. Clearly the Attorney-client privilege does not apply where the client voluntarily discloses the substance of the communication. By filing an affidavit to recuse and by stating certain facts the client waives any privilege with regard to those facts and to the fact of filing the affidavit itself. As such Mr. Butler waived any privilege he had with regard to the filing of his affidavit. In this case, the only area I inquired about was the contents of the motion to recuse which the client filed, making the document a public record, thereby waiving the privilege regarding that subject. I specifically told Mr. Melnick that I would not inquire into any other area of his representation, and I did not

Again, as I explained to this commission on November 6th I was not aware of Rule 2.330(f) of the Rules of Judicial Administration until this commission forwarded the Notice of Investigation to my attention. As a criminal lawyer for twenty years before being appointed to the bench I was not aware that these rules existed. We were not taught this rule at judicial college. I have spoken with numerous Broward County Judges about my recusal motion hearing with Mr. Melnick after the incident was reported on a courthouse blog. Only one Judge besides Judge Holmes told me that I couldn't hold a hearing. Neither Judge Holmes nor the other judges mentioned the Rule of Judicial Administration. Judge Holmes merely told me that there was "caselaw" dictating that I should not hold a hearing. If she was aware of Rule 2.330(f) she certainly would have told me. Also, when I contacted Circuit Court Judge Lisa Davidson, regarding the class she instructed at judicial college that I attended, after I explained the circumstances, she did not appear to be aware that this rule existed either. She reiterated what she taught in the materials.

I followed the materials as instructed at judicial college. We were taught that it is not recommended to hold a hearing, because if we hold a hearing, then we must grant the recusal. That is exactly what I did. I granted the recusal and did not rule on the merits of the allegations.

We were taught:

- 1) Stop what you are doing and rule on the motion. That is, resolve this issue first before addressing any issues of the case.
- 2) We were taught to rule within thirty days.
- 3) We were taught that the judge whom the motion is directed must decide the motion.
- 4) Pursuant to the materials it was recommended that we should not hold a hearing. Ruling on a motion for disqualification does not require a hearing. The materials detail the danger in holding a hearing and two cases are cited as illustration *Clark Auto* and *Cave* cases. In both of those cases, the trial judge took testimony and disputed the facts of the motion and then denied the motions.

I carefully complied with each step of the instructions that I was taught and believed to be the law with regard to a motion to recuse.

Further the materials state in bold, IF YOU DO HOLD A HEARING (strongly discouraged), you must assume that the facts in the motion are true and you should (not must) limit argument to the issue of whether the stated grounds are legally sufficient to require disqualification. IF YOU DISPUTE THE FACTS IN THE MOTION, THAT ALONE WILL REQUIRE YOU TO DISQUALIFY YOURSELF.

The materials next address the *Randolph* case. The judge conducted a hearing and the prosecutor made comments that went beyond the legal sufficiency of the motion. The trial judge did not dispute the facts of the motion and denied the motion. That ruling was affirmed on appeal since the Judge never disputed the facts.

I followed these materials when I conducted both hearings. I did take testimony, as the judges did in *Clark Auto* and *Cave*. I never disputed the facts. Not once in either hearing did I ever say that any allegation in the motion to disqualify was not correct. I never ruled on credibility. I accepted the allegations from the defense "as true", without comment from the bench, and then granted the motions. The materials instruct that IF WE DISPUTE THE FACTS, WE MUST RECUSE. That is what I did. I followed the materials. Nowhere were we taught that holding a hearing is forbidden. To the contrary, we were taught we have the discretion, although not recommended, to hold a hearing.

I even discussed with Mr. Melnick that I learned about holding the recusal hearing at judge school (although the court reporter, Ms. Carrie Givens, incorrectly transcribed my words as "judge gold"). It should have read "and you know that I spent a great deal of time on recusal at judge school," page 13 line 4 of the transcript of the hearing held on August 6, 2009.

There were many instances at judicial college where the lecturers strongly recommended against the new judges performing certain judicial acts. Just because an act is "strongly discouraged" does not mean that the act is prohibited. The instructors at judicial college spent time on the issue of "contempt hearings," where they also strongly discouraged trial judges from holding anyone in contempt or even holding a contempt hearing. However, trial judges have the discretion to hold an individual in contempt, notwithstanding the instructor's recommendations.

6. The allegations in paragraph six are true however they are drafted in an improper sequence and are misleading.

Initially I will address the meeting with Judge Holmes. I was contacted by Judge Holmes while I was holding court in the afternoon. While the court was in recess I left the bench and met with her for approximately five minutes. The discussion occurred a few days after the Gibbs hearing. She indicated that Mr. Melnick called her and was upset that I held a hearing on a motion to recuse. She stated that hearings cannot be held on a motion to recuse. Her exact words to me were that there was "caselaw out there" dictating that a hearing could not be held and that she would provide me with the cases. At that time I disagreed with her interpretation of the law and I told her so. I explained that the materials provided to us at judicial college and the lecture that I had attended instructed us that although a hearing is discouraged it is allowed but that the motion

to recuse would have to be granted. We never met again regarding this issue and she never provided me with any cases. After the discussion however I reviewed the materials that I was provided at judicial college. The materials confirmed my belief that I had the authority to hold the hearing.

Within a few days after that discussion the transcript of the hearing was posted on a courthouse blog. Several judges approached me after having read the transcript. They indicated to me that they believed that I had properly held the hearing and that I had properly recused myself afterward. None of the judges, all with various levels of judicial experience, ever mentioned the Rule of Judicial Administration which prohibits the holding of an evidentiary hearing on a motion to recuse and neither did Judge Holmes during our five minute conversation. Accordingly, at that time I still believed that I had handled the motion appropriately. I did not take Judge Holmes' statement as binding authority on the matter as I did my own review of the materials.

I mention this information because paragraph six seems to suggest that my discussion with Judge Holmes put me on notice that I had incorrectly handled the motion to recuse. Based on my knowledge of the materials from judicial college and my brief discussions with other judges I continued to believe that I had the authority to hold a hearing and was acting appropriately within the bounds of the law. My discussion with Judge Holmes was informative however I disagreed with her interpretation of the law. Further, she never again discussed this matter with me nor did she provide me with caselaw or citations.

The second allegation in paragraph six is incorrect as to the time sequence. I did in fact contact Mr. Melnick and agree to recuse myself on all future matters however that phone call was made after the Butler hearing and not after the Gibbs hearing as indicated in paragraph six. The timing is very important because paragraph six seems to suggest that I told Mr. Melnick I would recuse on all future cases and yet I did not. This is not what happened. In fact since that phone conversation I have recused myself on all matters that Mr. Melnick has pending in my division.

The third allegation states that I did not disclose to the commission the evidentiary hearing held on August 28, 2009 regarding Mr. Leon Butler. On November 6, 2009 a hearing was held before this commission regarding my conduct for holding a hearing on August 6, 2009 on a motion to recuse and for allowing my wife to testify at that hearing. Those were the only two issues addressed. I testified before the committee and told the truth as to what occurred and to my reasons for my actions. I did not feel it was warranted or appropriate to discuss the ethical behavior of Mr. Melnick at that time as the issue was *my* actions and not what Mr. Melnick did improperly. I knew that it was my actions which prompted an investigative inquiry, and the fact that Mr. Melnick was underhanded in his handling of the cases was not at issue. By discussing the August 28, 2009 hearing I would necessarily have had to discuss Mr. Melnick's unethical behavior as that is what gave rise to the hearing and I did not want this commission to believe

that I was not taking full responsibility for my actions, I did not want to blame Mr. Melnick for my actions. That is why I did not address the hearing I held on August 28, 2009.

The reason that I held the hearing on August 28, 2009 was because I believed Mr. Melnick was ~~perpetrating a fraud on the court.~~ I had learned after the August 6th hearing that Mr. Melnick had filed recusal motions on at least two cases where he had not filed notices of appearances, and he had even withdrawn from one case after the motion to recuse was filed. I had some serious concerns about Mr. Melnick's ethics at that point and it seemed that there was strong evidence to indicate that he had caused the filing of fraudulent affidavits and was forum shopping.

Within the three weeks between the hearings I learned, as I stated in my answer to paragraph one above, that Mr. Melnick was not the attorney of record in the Gibbs case and I was under the impression at that time that he had never filed a notice of appearance in the case. I later learned that he did file a notice but subsequently withdrew from the case. Additionally I learned that he had not filed a notice to appear on the other two cases that he had filed motions to recuse on at the August 6, 2009 hearing.

Further, I had learned that my belief that Mr. Melnick and I were friends and that we could clear this matter up easily because of our friendship was incorrect. It became clear to me after Mr. Melnick contacted Chief Administrative Judge for the criminal division, Ilona Homes and Mr. Bill Gelin the owner of the courthouse blog to complain about my actions that I overvalued our friendship. My knowledge of Mr. Melnick's behavior led me to have grave concerns about Mr. Melnick's motive in filing these recusal affidavits and in picking and choosing which cases to leave in my division and which to have removed from my division.

The purpose of the first hearing I held on August 6, 2009 was to flush out any issues Mr. Melnick was concerned about with regard to my ability to be fair and impartial. In fact the hearing I held involved the facts of his motion. The hearing that was held on August 28, 2009 was very different than the one previously held. On August 28 I inquired as to whether Mr. Melnick's client had any knowledge regarding the affidavit that he had sworn to. I did not hold a hearing refuting the facts of the affidavit only whether the defendant was aware of what he had signed. I did this to determine whether Mr. Melncik was properly following the rules of criminal procedure and to determine if he was forum shopping.

At this point it is important that this commission become familiar with Mr. Melnick's reputation among the courthouse and his credibility. Stephen Melnick is the lawyer in the courthouse who regularly appears in court dressed in jeans and a casual blazer, no tie and untied sneakers. He is very lax in his approach to the court, shows a general disdain for the authority of the court and does not respect the decorum of the courtroom. Many of Melnick's clients appear in court without him and indicate that he has told them to appear for him and to request a reset or a continuance on their own.

Currently Melnick is representing a thirteen year old child who was arrested and remains a suspect in a high profile attempted murder case. The prosecution has initially declined to file charges against him but are still investigating the matter. His brother was charged with the crime and is in custody pending the outcome of the case. A few weeks ago Melnick held a press conference at his office and had the thirteen year old child speak to the press. Further he has appeared on the *Today Show* in New York with the thirteen year old child and his parents to once again have the child speak about the incident even though it is still pending and he is still a suspect.

Another example of Melnick's behavior I include a copy of an entry of October 27, 2009 in a Miami Courthouse Blog where an anonymous Dade county criminal defense attorney describes how he appeared in front of Judge Seidman one morning in Broward and was unable to resolve a matter in his courtroom and the matter was reset for a future date. Melnick addressed the lawyer in the courthouse cafeteria after the hearing and indicated that Judge Seidman was up for election and that he was collecting money for his campaign. He further indicated that Judge Seidman is more lenient if he actually knows the lawyer appearing before him. He then handed the Dade lawyer a support envelope. The anonymous lawyer indicated that he felt as if Melnick had "hit him up" for a campaign contribution in the courthouse on Judge Seidman's behalf. I do realize that this information cannot be confirmed as the blogger was "anonymous" but I present it here as it is consistent with Melnick's reputation in the legal community. However, if necessary it would be possible to identify the lawyer involved by reviewing the docket of Judge Seidman for the week of October 27, 2009.

7. I have practiced law for approximately twenty years, I was Board Certified in Criminal Law and was AV rated by my peers and the Broward County judiciary. I have been a Circuit Court Judge in the juvenile/dependency division and the criminal division. I have served Broward County as a Circuit Court Judge for three and a half years. In addition I have served the people of Broward County as an Assistant State Attorney and a specially appointed Public Defender and I have always served with dignity, fairness, honesty and humility because that is my work ethic.

My reputation as a judge is one of respect for all litigants and courtroom personnel that appear in the courtroom. I am always careful to allow all parties to be heard and I always allow any interested party to speak. I am careful to always be on time for court, to respect witnesses, jurors, lawyers, court reporters, probation officers, bailiffs, county clerks, victims, defendants and their families. I believe that my reputation as a judge is one of neutrality and a fair and calm demeanor. In fact I implore this commission to contact courtroom personnel and lawyers who appear before me to investigate my work ethic and my handling of matters as a judge. I believe this commission will learn that I have a reputation for being a hardworking, diligent and fair judge with a calm and respectful demeanor.

When I took over the criminal division that I now have it was one of the largest divisions in the courthouse. I have earned the title of one of the lead criminal division judges trying cases in

Broward County. I am among the top three judges in trial statistics. This is because I believe that justice delayed is justice denied and is patently unfair to all parties and I seek daily to serve the people and promote justice. The judicial office that I hold is one that I do not take lightly. I have great respect for the position and understand that the position holds a great responsibility to the citizens of my county.

As a lawyer I practiced in front of hundreds of judges in Palm Beach, Dade and Broward County as well as the federal courts. At times I have appeared in front of judges whose behavior and statements were outrageous and clearly rose to the level of constituting, "... an oblivious disregard for the Code of Judicial Conduct and constitutes a pattern and practice unbecoming a judicial officer and lacking the dignity appropriate to judicial office, with the effect of bringing the judiciary into disrepute." Nothing that I have done rises to this level.

Paragraph seven is an inflammatory statement that tracks the wording of the Preamble to the Code of Judicial Conduct but does not correctly describe my behavior as a judge. The first investigation by the Judicial Qualification Commission regarding my behavior was in July of 2008 when the commission was notified that my wife had used a photo of me on her website for her law firm. Once we learned of the error in the spring of 2008, before the commission sent a Notice of Investigation, my wife immediately removed the photo from her website. The website had been online for only a few months at that point, she used the website as an electronic brochure and did not promote it through a search engine on the internet. This commission then filed an inquiry and I appeared before a committee and explained that the photo was removed. The matter was discussed with me and then closed.

The next time the commission investigated my behavior was pursuant to the August 6th hearing. The more recent Notice of Investigation, regarding a hearing held on August 28th, is a continuation of the same behavior that was investigated previously. Both investigations involve evidentiary hearings that were held pursuant to one attorney's motions to recuse. I do not believe that these actions on my part are a "pattern or practice." The conducting of evidentiary hearings with regard to motions to recuse was based on my knowledge of materials I was provided at judicial college and caselaw provided in those materials as well as a lecture on the materials by Circuit Court Judge Lisa Davidson.

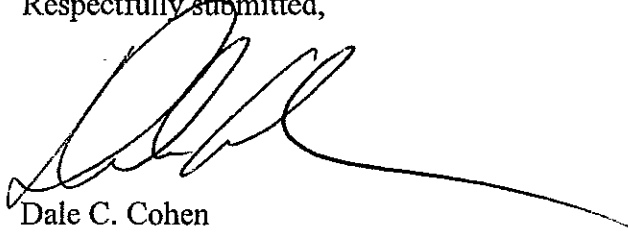
I erred in failing to have the proper knowledge of The Rule of Judicial Administration 2.330 (f) but in good faith believed that I was correctly following the law pursuant to my review of the materials provided at judicial college. Erring to follow the law due to conflicting caselaw and rules does not rise to the level of disregarding the Code of Judicial Conduct and bringing the judiciary into disrepute. None of this was done intentionally with a motive to disrespect the judiciary, lawyers or the parties involved, or to somehow promote my own interests.

In the past three in a half years as a judge I have not had to regret one thing that I have said nor have I failed to follow the laws of this state. I can assure this panel that I have never

intentionally thwarted or avoided following the law. I am well aware now of the Judicial Rules of Administration and I will not violate those rules again.

Attached to this response are affidavits from Court Clerk Ebony King and former Assistant Attorney Florence Taylor in an effort to recreate the record. Also attached is an entry from the Miami Courthouse Blog regarding a conversation between Steve Melnick and an unidentified Dade County lawyer.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dale C. Cohen', with a long horizontal flourish extending to the right.

Dale C. Cohen

State v. Leon Butler

08-22681cf10a

Date of Court Hearing 8/28/09

Oath: I, Florence Taylor Barner, swear or affirm that the facts in this affidavit are true to the best of my knowledge. I make this statement of my own free will and understand that it is under the penalty of perjury.

On 8/28/09 during the afternoon docket the Court held a hearing to determine whether the Court should recuse itself from the case where Mr. Melnick was the attorney of record. I was present for the hearing and observed parts of the hearing. It should be noted that Rick Rosenbaum was also present for parts of the hearing as were the courtroom staff (i.e. bailiffs Bernard Hardge and Ylanda Lessane and court reporter Keri Givens and the in-court clerk ebony king) Mr. Melnick sought to recuse Judge Cohen because Mr. Melnick worked on the campaign of then Judge Pedro Dijols against Mardi Cohen, Judge Cohen's spouse. Mr. Melnick objected to the Court having a hearing but the Court indicated that he did not understand why Mr. Melnick was seeking a recusal since the Court has always been fair to Mr. Melnick and his clients in the past and the Court did not understand Mr. Melnick's prejudice argument. Mr. Melnick explained to the court that he believed that his client could be prejudiced based on Mr. Melnick's work on the campaign and based on a previous recusal hearing wherein the Court questioned Mardi Cohen about the campaign and Mr. Melnick's involvement. I was present at the previous hearing where Mr. Melnick alleged that the Court may be biased against him and his clients because Mr. Melnick worked on the campaign of then Judge Pedro Dijols. Specifically, Mr. Melnick stated on the record that he felt that because Mardi Cohen, Judge Dale Cohen's wife, ran for the seat occupied by Judge Dijols that Judge Dale Cohen could potentially be prejudiced against him and his clients because of Mr. Melnick's work on the campaign to help Judge Dijols retain his seat.

During the 8/28/09 hearing Judge Cohen swore in the defendant and proceeded to inquire of the defendant of the allegations in the motion. Specifically, Judge Cohen asked Mr. Butler whether he knew anything about an election and Mr. Butler denied knowing anything about it. Mr. Butler indicated that he had spoken to his attorney, Mr. Melnick, about "going to a different judge" because of some issues between the judge and Mr. Melnick. Mr. Melnick then objected to courts inquiry citing to the attorney-client privilege and the court informed Mr. Melnick that the information was not privileged since it pertained to the facts in the motion that the client swore to. Mr. Melnick continued to object to the courts inquiry as to the other allegations in the motion. Specifically, Mr. Melnick said that he felt that during the previous hearing his credibility was being weighed against that of Mardi Cohen. The Court indicated that he has known Mr. Melnick for 20 years and has never felt any prejudice against him and the Court has always treated him fairly. Mr. Melnick indicated that he believed that the Court could not be fair in light of the

circumstances and the court indicated that Mr. Melnick was proceeding on perilous grounds in the sense that he could be perceived to be forum shopping. Mr. Melnick indicated to the court that he was not forum shopping and believed that the court should recuse itself based on the allegations in the motion. The court then advised Mr. Melnick that if he was forum shopping then that could be something that the Florida bar would be concerned about. Mr. Melnick then inquired of the court as to whether the court was threatening him with a bar complaint and the court did not respond. The court then recused itself.

State of Florida
County of Broward

Sworn to (or affirmed) and subscribed before me this 22nd day of DECEMBER, 2009
2009 by Florence Taylor Barner Florence Taylor Barner

(Signature of Notary Public - State of Florida)

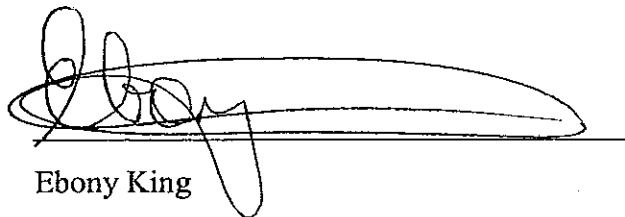


(Print, Type, or Stamp Commissioned Name of Notary Public)


Personally Known ☒ OR Produced Identification ☐

Type of Identification Produced _____

On August 28, 2009, the calendar call docket was being called by the Honorable Judge Dale Cohen. At the end of the docket, there remained an individual sitting out in the gallery. Judge Dale Cohen called the individual up and asked his name. The defendant's name was Leon Butler, with the case number 08-22681CF10a. Judge Dale Cohen asked if he had an attorney and the defendant replied, "yes, but he is not coming." Judge Dale Cohen asked the defendant who was his attorney, and he stated Stephen Melnick. Judge Cohen told him to return to the courtroom after lunch at 1:30pm with his attorney. Leon Butler returned at 1:30pm with defense attorney Stephen Melnick. Stephen approached Judge Dale Cohen with a sworn signed affidavit by the defendant to have the court recused off of the case. When Judge Dale Cohen asked the defendant information regarding what was contained in the document that he had signed, the defendant could not give an answer. When Judge Dale Cohen asked the defendant what information had been provided to him for him to sign a sworn affidavit, the defendant would reply by saying, "you would have to ask him (him meaning Stephen Melnick)." When asked again by Judge Dale Cohen, the defendant would give the same reply. Judge Dale Cohen signed the order to recuse the court from the case. This is a typed statement by Ebony Nicole King, the In Court Clerk for Division FG. I hereby swear that the facts contained in the statement are true and correct.


Ebony King

Sworn and subscribed before me this 10th day of December, 2009 by Ebony King, personally known to me.


Notary Public- State of Florida
State of Florida
Broward County

NOTARY PUBLIC-STATE OF FLORIDA
Rebecca R. Sanvi
Commission #DD806750
Expires: SEP. 04, 2012
BONDED THRU ATLANTIC BONDING CO., INC.

An Entry from the Miami Courthouse Blog- dated 10/27/09

Anonymous said...

So I was north of the border today when one of the most screwed up things happened. I was trying to get Judge Seidman to consider alcohol treatment as mitigation for a proposed jail sentence and he gave me a really hard time but reset me for a month. I stopped to talk to a friend from law school in the courthouse cafeteria when a lawyer named Steve came up to me (wearing no jacket nor tie wearing sneakers and cargo pants, only in Broward would someone go to court dressed like that) and told me that the Judge was in a tough reelection battle and needed help as he was the only judge in Broward willing to mitigate to a treatment program on a 2nd DUI within 5. Steve went on to explain that good Judges like this needed money to survive a tough campaign. Steve explained that while sometimes the Judge could give lawyers he didnt know a hard time but that once he knows you he is respectful. He then handed me a donation envelope and left. I felt like I was slimed. While it wasnt said it sure felt like a pay to play situation. Anyone else been through this up there? I hope and want to believe the Judge knew nothing about this Steve guy. Should I tell the Judge?

Tuesday, October 27, 2009 9:13:00 PM

DISQUALIFICATION & DISCLOSURE

*Florida Judicial College • Phase II • March 11-16, 2007
Orlando, Florida*



**Lisa Davidson
Circuit Court Judge
Eighteenth Judicial Circuit**

DISQUALIFICATION & DISCLOSURE¹

I. DISQUALIFICATION ON A JUDGE'S OWN MOTION

A. CANON 3E(1), FLA. CODE OF JUD. CONDUCT

Canon 3E(1), Florida Code of Judicial Conduct, requires a judge to disqualify herself or himself when the judge's impartiality might reasonably be questioned including, but not limited to when:

1. the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; or
2. the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it; or
3. the judge knows he or she (or his or her spouse, parent, child, or other member of the judge's household) has an economic interest in the subject matter in controversy or is a party or has more than a *de minimis* interest that could be substantially affected by the proceeding; or
4. the judge or judge's spouse, or a person within the third degree of relationship of them, or that person's spouse:
 - a) is a party to the proceeding or an officer, director or trustee of a party;
 - b) is acting as a lawyer in the case;
 - c) is known by the judge to have more than a *de minimis* interest that could be substantially affected by the proceeding;
 - d) is to the judge's knowledge, likely to be a material witness in the proceeding.
5. The judge's spouse or a person within the third degree of the relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge.
6. The judge, while a judge or a candidate for judicial office has made a public statement that commits or appears to commit the judge with respect

¹ This outline has been adopted and modified from the Outline entitled DISCLOSURE, DISQUALIFICATION, AND EX PARTE COMMUNICATIONS, prepared by the Honorable Judge Daniel T. K. Hurley, United States District Court for the Southern District of Florida and the Honorable Judge John Antoon II, United States District Court for the Middle District of Florida.

to parties or classes of parties in the proceeding; an issue in the proceeding; or the controversy in the proceeding.

B. DUTY TO DISCLOSE VS. DUTY TO DISQUALIFY

The duty to disclose is broader than the duty to disqualify. (Note – disclosure should always be on the record or in writing.)

1. The commentary to Canon 3E(1) states, if a judge makes a disclosure, it is not necessarily a basis for disqualification.
2. In the past there was a presumption that, if a matter was important enough to require disclosure, it would constitute a sufficient factual basis to support a motion to disqualify under rule 2.330 (former 2.160), Florida Rules of Judicial Administration.
3. The Code was amended by the Supreme Court in In re Code of Judicial Conduct, 659 So. 2d 692 (Fla. 1995), and now the judge who makes a disclosure is not automatically subject to disqualification. JEAC Op. 03-22. The issue should be addressed on a case-by-case basis. E.g., W.I. v. State, 696 So. 2d 457 (Fla. 4th DCA 1997) (Judge not required to disqualify upon disclosure that she had a friendship with juvenile's caseworker).

The commentary to 3E(1) states that a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no a real basis for disqualification.

If a lawyer or party has previously filed a complaint against the judge with the JQC, that fact does not automatically require disqualification of the judge. Fla. Code Jud. Conduct, Canon 3E(1) Commentary.

4. If the Judge offers to the parties to recuse himself/herself, then the judge must fulfill the offer if one of the parties accepts it. Deloach v. State, 911 So. 2d 888 (Fla. 1st DCA 2005).

C. PLAIN LANGUAGE OF CANON 3E IS NOT EXCLUSIVE

The plain language of Canon 3E is not exclusive. For example, Fla. JEAC Op. 99-13 states that a judge currently represented by an attorney must automatically recuse himself or herself whenever the attorney or members of his firm appear before the judge even if the matter is an uncontested matter such as a default mortgage foreclosure or uncontested dissolution of marriage.

D. REMITTAL – CANON 3F, FLA. CODE OF JUD. CONDUCT

REMITTAL: A judge disqualified by the terms of Canon 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding. Fla. Code Jud. Conduct, Canon 3F.

As a practical matter a judge may wish to have all parties and their lawyers sign the remittal agreement although the commentary indicates that parties may act through counsel if counsel represents on the record that the party has been consulted and consents. Fla. Code Jud. Conduct, Canon 3F, Commentary.

II. DISQUALIFICATION UPON MOTION OF COUNSEL/ LITIGANT

Fla. R. Jud. Admin. 2.330 (Note: Although rule 2.330 is entitled "Disqualification of Trial Judges," it also applies to a trial judge sitting as a circuit appellate judge.) See Smith v. Santa Rosa Island Auth., 729 So. 2d 944 (Fla. 1st DCA 1998).

A. RULE 2.330(d), FLA. R. JUD. ADMIN. (former 2.160)

Rule 2.330(d) sets forth the following bases for a disqualification motion:

1. the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;
2. the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof;
3. the judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree; or
4. the judge is a material witness for or against one of the parties to the cause.

B. SECTION 38.10, FLORIDA STATUTES (2006)

1. Whenever a party makes and files an affidavit stating fear that the party will not receive a fair trial on account of prejudice of the judge, the judge shall proceed no further, but another judge shall be designated.
2. Every affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.
3. Requirements consistent with Rule 2.330, Florida Rules of Judicial Administration.

4. When a judge has disqualified himself/herself, second judge is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties.

Note: Section 38.10, Florida Statutes, does not apply to appellate judges.

In re Estate of Carlton, 378 So. 2d 1212 (Fla. 1979). An appellate judge must determine for himself/herself both the legal sufficiency of a motion to disqualify the judge and the propriety of withdrawing in any particular circumstance. Id.; see also Adams v. Smith, 884 So. 2d 287 (Fla. 2d DCA 2004).

C. HOW TO HANDLE A MOTION FOR DISQUALIFICATION

1. **STOP WHAT YOU ARE DOING IN THE CASE AND RULE ON THE MOTION.** In addition to filing with the clerk, the movant shall immediately send a copy of the motion to the subject judge for "immediate ruling." Fla. R. Jud. Admin. 2.330(c), (e). A judge is "faced" with a motion for disqualification when the motion is filed with the clerk. "A judge faced with a motion for disqualification should first resolve that motion before making any other rulings in a case." Loevinger v. Northrup, 624 So. 2d 374 (Fla. 1st DCA 1993). See also Valdes-Fauli v. Valdes-Fauli, 903 So. 2d 214 (Fla. 3d DCA 2005); Hoffman v. Crosby, 908 So. 2d 1111 (Fla. 1st DCA 2005); Berkowitz v. Rieser, 625 So. 2d 971 (Fla. 2d DCA 1993); Airborne Cable Television, Inc. v. Storer Cable TV of Florida, Inc., 596 So. 2d 117 (Fla. 2d DCA 1992). IT IS ERROR TO TAKE ANY OTHER ACTION IN THE CASE BEFORE RULING ON THE MOTION TO DISQUALIFY. Shah v. Harding, 839 So. 2d 765 (Fla. 3d DCA 2003) (granting a new trial because trial judge failed to follow the proper procedure in consideration of a disqualification motion, by ruling on the motion after deciding the merits of the case); Brown v. State, 863 So. 2d 1274 (Fla. 1st DCA 2004) (once motion to disqualify is filed, "no further action can be taken, even if the trial court is not aware of the pending motion"). While a motion to disqualify is pending, the trial court is not authorized to rule on other pending motions and all such motions that the trial court does rule upon during this period must be vacated. Gomez v. State, 900 So. 2d 760, 761 (Fla. 4th DCA 2005); Elegele v. Halbert, 890 So. 2d 1272, 1274 (Fla. 5th DCA 2005).

2. **DISQUALIFICATION MOTION MUST BE RULED ON IMMEDIATELY BUT NO LATER THAN 30 DAYS FOLLOWING ITS PRESENTATION TO THE COURT.** Fla. R. Jud. Admin. 2.330(j); Tableau Fine Art Group, Inc. v. Jacoboni, 853 So. 2d 299 (Fla. 2003). Rule 2.330(c), Florida Rules of Judicial Administration, requires a party to file the motion to disqualify with the Clerk's Office in addition to "immediately serv[ing] a copy of the motion on the subject judge" by mail

to the judge's chambers. Tobkin v. State, 889 So. 2d 120 (Fla. 4th DCA 2004).

IF THE JUDGE FAILS TO RULE ON THE MOTION TO DISQUALIFY WITHIN 30 DAYS AFTER SERVICE OF THE MOTION, THE MOTION IS DEEMED GRANTED AND THE MOVING PARTY MAY SEEK AN ORDER OF THE COURT DIRECTING THE CLERK TO REASSIGN THE MOTION. Fla. R. Jud. Admin. 2.330(j); Gomez v. State, 900 So. 2d 760 (Fla. 4th DCA 2005).

However, note an exception to this rule – If the movant fails to serve a copy of the motion to disqualify on the judge as required by rule 2.330(c) and as a result, 30 days passes without the judge making a ruling, then rule 2.300(j) is not implicated. Harrison v. Johnson, 934 So. 2d 563 (Fla. 1st DCA 2006).

3. A motion to disqualify a judge must be decided by the judge to whom the motion is directed. Roy v. Tomlinson, 639 So. 2d 1112 (Fla. 1st DCA 1994).

4. SAY NOTHING AND TAKE THE MOTION TO CHAMBERS.
THREE RULES:

DO NOT TAKE IT PERSONALLY
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- a. Expressing displeasure with attorney for bringing motion to disqualify may be considered intimidation. See Mard v. Freeman, 688 So. 2d 455 (Fla. 5th DCA 1997). After receiving an oral motion to disqualify, the judge allegedly ordered the attorney into chambers and advised him that he (the judge) “had a very strong dislike for anyone who demonstrated such unprofessional behavior and challenged his (the judge’s) authority and that attorneys in his courtroom paid a price for such behavior.” The judge later denied a motion to disqualify containing these allegations. Pinnacle Ins. Co. v. Freeman, 687 So. 2d 989 (Fla. 5th DCA 1997). See also Martin v. State, 820 So. 2d 403 (Fla. 3d DCA 2002) (Judge’s comment to defense attorney that the attorney’s initial motion for judge’s disqualification “was filled with defense counsel’s personal convictions” required judge’s disqualification because it created an “intolerable adversary atmosphere.”)
- b. DO NOT HOLD A HEARING. Ruling on a motion for disqualification “does not require a hearing, oral argument, the presentation of evidence, or a review of prior court proceedings. The legal sufficiency of the motion and affidavits is purely a question of law.” Larimer v. State, 50 Fla. Supp.2d 13 (Fla. 5th Cir. Ct. 1991).

The danger of holding a hearing is illustrated by Clark Auto Leasing & Rentals, Inc. v. Lupo, 547 So. 2d 1016 (Fla. 4th DCA 1989), where the trial judge denied the motion and then, at the request of plaintiff's counsel, administered an oath to permit counsel to address and refute the factual allegations in the motion and affidavits. The appellate court ruled, "Although the trial judge stressed that her ruling was based upon the legal sufficiency of the motion and affidavits, the transcript reveals that she indirectly took an active role in addressing the truthfulness of the allegations." Therefore, the writ of prohibition was granted. Another example is Cave v. State, 660 So. 2d 705 (Fla. 1995), in which the court called witnesses to rebut the defendant's allegations contained in his motion to disqualify. Notwithstanding the fact that the motion may have been deficient, the murder conviction was reversed.

In Nathanson v. Nathanson, 693 So. 2d 1061 (Fla. 4th DCA 1997), the trial judge was disqualified for improperly allowing the guardian ad litem to respond regarding the truthfulness of the allegations in the motion to disqualify.

IF you do hold a hearing (strongly discouraged), you must assume that the facts in the motion are true and you should limit argument to the issue of whether the stated grounds are legally sufficient to require disqualification. If you dispute the facts in the motion, that alone will require you to disqualify yourself. See Randolph v. State, 626 So. 2d 1006 (Fla. 2d DCA 1993) (The trial judge conducted a hearing on the motion to disqualify and asked if the prosecutor wished to be heard. The prosecutor made comments which were inappropriate because they went beyond the question of the legal sufficiency of the motion. Nonetheless, the appellate court ruled that "the prosecutor's comments. . . should not be attributed to the trial judge." The trial court's denial of the motion was affirmed because the judge ruled on the motion without disputing the facts.); Niebla v. State, 832 So. 2d 887, 888 (Fla. 3d DCA 2002) (Although it is impermissible for a trial judge to refute the charges in a motion to disqualify, a court is permitted to state the status of the record. Held: Trial judge could state that he imposed consecutive life sentences after defendant's trial.); Shuler v. Green Mountain Ventures, Inc., 791 So. 2d 1213, 1215 (Fla. 5th DCA 2001) (explaining that while a trial judge may not pass on the facts of the truth alleged, the judge may explain the status of the record).

D. DETERMINE PROCEDURAL REGULARITY

1. Procedural requirements for motion to disqualify pursuant to Rule 2.330, Florida Rules of Judicial Administration. Motion must:
 - i) be made by a party;
 - ii) be in writing;